

EXHIBIT S

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION
BEFORE: CHARLES A. LEGGE, JUDGE (Ret.)

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ORACLE CORPORATION, a Delaware
Corporation; ORACLE, USA, INC.,
a Colorado corporation, and
ORACLE INTERNATIONAL CORPORATION,
a California corporation,

Plaintiffs,

vs.

No. 07-CV-01658-MJJ

SAP AG, a German corporation,
SAP AMERICA, INC., a Delaware
corporation, TOMORROWNOW, INC.,
a Texas corporation, and DOES
1-50, inclusive,

Defendants.

HEARING IN RE DISCOVERY ISSUES

Tuesday , March 4, 2008

JAMS
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San Francisco, California

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1 Now, many of these entries which deal with
2 customers leaving Oracle don't have that level of
3 detail. This one at least gives us the road map that
4 there was that customer complaint that was a direct link
5 to the customer leaving, but in many, many cases on
6 these customers leaving Oracle, the entries are much
7 more generic.

8 Here's one on the very next page. All it says
9 is: "In February, I contacted Joe Strumberger who we
10 worked with last year." So what they're doing is
11 they're saying, well, here's one summary we have that's
12 kind of sort of what you're looking at and like it or
13 lump it. But they're not telling us that they will
14 produce customer complaints in their possession and
15 control for these customers.

16 MR. HOWARD: I don't think that's right, your
17 Honor, but let me make two observations about what
18 Mr. McDonell just said. Number one, I would be a little
19 surprised if Mr. McDonell didn't now go out and subpoena
20 Lexmark and ask them directly, well, why did you leave,
21 if you left, and number two, what he's now demonstrated
22 is that you actually can conduct focused discovery that
23 isn't all documents relating to customer complaints
24 about Oracle support or maintenance services.

25 So, you know, we've never said that we won't

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1 listen to requests, you know, for targeted follow-up
2 discovery. What we've objected to is having to search
3 through the entire company for, you know, the day-to-day
4 discussions that could be construed about some random
5 thing for some other customer.

6 MS. HOUSE: And you've got to keep it tied to
7 why they went to TomorrowNow. You certainly have gotten
8 a flavor within these two hearings, there's plenty of
9 material that's actually right in the target zone for
10 this particular cause of action, this particular
11 complaint.

12 You go even remotely afield and you really
13 start to get it even more unwieldly and ridiculous. So
14 the focus is the way to go.

15 JUDGE LEGGE: Anything more?

16 MR. McDONELL: I would just note that what
17 we're looking for is customer complaints that might
18 reasonably be related to reasons customers ceased
19 working with Oracle, which I think they have and could
20 readily identify.

21 JUDGE LEGGE: All right. Submitted. Number
22 four is submitted.

23 Number five is request 52 and 118 dealing with
24 the Change Assistant and its database, I guess is what
25 we're talking about, are we not? The search engine has

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1 its own database.

2 MR. HOWARD: It does. It has a series of nine
3 databases, your Honor, and I think that this is --
4 should be resolved.

5 JUDGE LEGGE: I hope so. Now, what I get is,
6 in your letter at the bottom of page 7, you're talking
7 about, I suppose, a swap deal --

8 MR. HOWARD: Right.

9 JUDGE LEGGE: -- where you give information on
10 Change Assistant and they give you information on Titan.
11 They think they have that deal with you. I'm not sure
12 whether they did or didn't.

13 And then the last paragraph on page 8, Oracle
14 will produce the requested databases as highly
15 confidential. Okay.

16 MR. HOWARD: Right.

17 JUDGE LEGGE: So has everything been agreed to.

18 MR. COWAN: Your Honor, this is Scott Cowan.
19 We reached the same conclusion after reading the
20 response, that Oracle has agreed to produce what we've
21 asked or sought your assistance in compelling them to
22 produce. The only question I have, which was unclear
23 from their response, is whether the Change Assistant
24 that they're agreeing to produce, all the versions of
25 Change Assistant is in fact the source code and not the

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1 compiled program, because we've produced the source code
2 of Titan.

3 JUDGE LEGGE: So you want the source code and
4 not what?

5 MR. COWAN: Well, we would like the compiled
6 version as well, but we want to make sure when they
7 produce Change Assistant we get the source code of the
8 Change Assistant so we can see what it is doing and
9 compare how Change Assistant does what it does to how
10 Titan does what it does.

11 MR. HOWARD: Your Honor, I have to say that I
12 don't believe I have ever heard that request before. I
13 don't think it's within the scope of the RFP that has
14 been proffered, and I can't imagine why they would need
15 all of the source code for Change Assistant. The point
16 here is the functionality of it, at least as best I've
17 heard it from them up until now through all the meet and
18 confers. If what they're seeking is source code, then
19 I'd like an opportunity to brief that or at least
20 consider it and consult with my client about it.

21 MR. COWAN: Your Honor, I think we've already
22 briefed it. The issue really comes down to, and
23 Mr. Howard knows this, producing those programs to us in
24 the compiled form are useless because there is no way we
25 can or our experts can use those programs without a live

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1 connection to Customer Connection.

2 They have only allowed us access to date to
3 Customer Connection to a very, very controlled remote
4 access saying where we have to log in as a user on their
5 expert's computers while they watch what we do, and we
6 can't download anything directly to even our expert's
7 computers. We have to download to their expert's
8 computers. They look and see what we've done and then
9 decide whether they want to give it to us.

10 Right now, we've had a very, very attenuated
11 access to Customer Connection and that which may be the
12 subject of a further motion, but the big issue here is
13 having our software expert analyze the Change Assistant
14 program and compare it to what the Titan program is
15 doing, because now doubt they will compare Titan against
16 their own software and how it does what it does. They
17 have Titan source code. All we're asking for in
18 exchange is the reciprocal production in producing
19 Change Assistant source code.

20 MR. HOWARD: There's a big difference, your
21 Honor. Titan was a program that they developed in order
22 to steal Oracle's materials. Why is the result of that
23 that they get Oracle's proprietary source code that they
24 provide to its customers?

25 MR. COWAN: We don't object to their producing

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1 it under the highly confidential designation as we
2 produced the Titan source code. We're entitled to see
3 how Change Assistant does what it does, just like
4 they're entitled to see how Titan does what it does.
5 And the fact that, you know, whatever labels they want
6 to put on Titan or whatever motives they want to ascribe
7 to how Titan was created or why Titan was created, the
8 fact remains, and Mr. Howard hasn't denied and I don't
9 think can deny, that they won't compare the two programs
10 either during the pretrial proceedings or trial of this
11 case.

12 We need that source code of that software.
13 We've asked for it. We've asked for access to it.
14 They've extremely limited our access. Our experts need
15 this to look at it. Their experts have Titan. We need
16 what they admit in their response is the reciprocal
17 component of that on their side.

18 MR. HOWARD: Your Honor --

19 JUDGE LEGGE: Well, you do refer to source code
20 on page 6 of your motion.

21 MR. COWAN: Yes, we do.

22 JUDGE LEGGE: I read right over that. I didn't
23 pay any attention to it. Let me ask this. When you
24 produce versions, as you say, of Change Assistant, what
25 format will that be in? What form is it in?

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1 MR. HOWARD: It's in the form in which the
2 customers or in this case TomorrowNow downloaded it to
3 use to search the databases that we've also agreed to
4 produce. So it's essentially like getting a program
5 over the counter that you could use.

6 JUDGE LEGGE: So any reasonable engineer ought
7 to be able to take your version and use it?

8 MR. HOWARD: Not even an engineer. I mean,
9 anybody can load it up onto a computer and operate it to
10 search for things and see how it works.

11 JUDGE LEGGE: Well, then why do you need source
12 code?

13 MR. COWAN: Because the program that Mr. Howard
14 is referring to that says it's off the shelf and your
15 average customer can use, and I agree once you install
16 it you can use it, but it is a companion piece of
17 software that will not work without it being connected
18 to Customer Connection. For example, you installed
19 Microsoft Word on your own personal computer at home.
20 You know what it can do for you by watching what it can
21 do for you, but you don't know how it does what it does.
22 And you have to have the source code of a program. This
23 is fundamental, and I would expect Mr. Howard
24 appreciates this.

25 The only way you can know how the program does

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1 what it does is look at the programming language, the
2 source code behind it to see how it's doing it. They
3 have asked for, they demanded that we produce the source
4 code of Titan. We could have produced it in a compiled
5 form, you know, in the install it form that they're
6 trying to produce Change Assistant, but they demanded
7 that we produce the source. They demanded that we
8 produce source code that even if it hadn't been compiled
9 and used by TomorrowNow.

10 We ultimately relented and produced every copy
11 of every source even if it never been compiled. All
12 we're asking for was that reciprocal part of that
13 agreement. We thought that's what their response says.
14 It clearly not, and that's why I wanted to raise this
15 issue.

16 JUDGE LEGGE: I'm looking at your letter of
17 February 19, page 6, you want Change Assistant and
18 associated database.

19 MR. COWAN: We want the Change Assistant
20 software -- that's the first thing. They've agreed to
21 produce that -- comma, its source code, which is what
22 we're talking about right now, and three associated
23 databases. They've agreed to produce the first and the
24 third but not the second.

25 JUDGE LEGGE: Now, you say that the purpose is

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1 that this Change Assistant is what is going to interface
2 and enable you to read the Customer Connection Web site.

3 MR. COWAN: Without having the ability for our
4 expert to operate with total freedom, the total access
5 to Customer Connection in his own environment and in his
6 own laboratory to look and see how Change Assistant does
7 what it does and interacts with Customer Connection,
8 which is the larger Web site that Oracle posts these
9 SSM's on, we have no way of knowing, and even then we
10 still don't have any way of knowing how Change Assistant
11 does what it does or how Change Assistant interacts with
12 these nine different databases that comprise 1.2
13 terabytes of data.

14 We have to have the source code to do that. We
15 have to see which databases are being called in the
16 program by Change Assistant and what data is being
17 pulled out of which database. That you will not see by
18 simply getting a copy of the compiled Change Assistant
19 program.

20 JUDGE LEGGE: Why do you need that?

21 MR. COWAN: To understand the relationship of
22 the data associated with the mapping.

23 JUDGE LEGGE: Just a minute, sir.

24 MR. McDONELL: Scott, you have to take a breath
25 every now and then. His Honor is trying to respond to

1 One thing I haven't heard back from
2 Mr. Howard --

3 JUDGE LEGGE: I'm missing something. I'm
4 missing something.

5 MR. McDONELL: Your Honor, would it be helpful,
6 as Mr. Howard suggested, that there be a supplemental
7 writing on this?

8 JUDGE LEGGE: Yeah.

9 MR. McDONELL: I'm gathering there's not a lot
10 of communication.

11 JUDGE LEGGE: You are correct. You did put
12 source code as part of the definition of what you're
13 looking for in your letter of the 19th. Let me see what
14 you said about it in your actual --

15 MR. HOWARD: It's request 118 your Honor, which
16 says nothing about source code and in fact asks for
17 exactly what we've agreed to provide.

18 JUDGE LEGGE: Well, it says in 118 that you
19 want it for the sole purpose of giving access to be able
20 to inspect Customer Connection.

21 MS. HOUSE: Yeah.

22 MR. COWAN: Correct, and we need the underlying
23 data that's in that source code to be able to do that,
24 your Honor, fully. What they're wanting to do is give
25 us the engine or give us the car without letting us open

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1 what you're saying.

2 MR. COWAN: I'm sorry.

3 JUDGE LEGGE: The purpose of getting Change
4 Assistant is to be able to read Customer Connection. If
5 you are given Change Assistant and that enables you to
6 read Customer Connection, why do you need any further
7 information about how the interface does that job?
8 You're getting what you want.

9 MR. COWAN: Because they have had in the last
10 hearing and based on how the Court ordered or how you,
11 your Honor, ordered us to figure out the mapping issue,
12 we have to understand the relationships that Change
13 Assistant uses to tie the licensed software to the
14 software support materials.

15 The guts, if you will, the inner workings of
16 the Change Assistant as revealed by its source code will
17 give us that ability for our own engineers to do what
18 clearly it appears you have indicated that we have the
19 burden to do with their expert assistance that you've
20 ordered, but that we have the burden to go figure out
21 ourselves. And this is part of it. This is another
22 piece of that that we need to help map up those licensed
23 products to the downloads to help us determine which if
24 any of them -- which of them were actually
25 inappropriate.

1 the hood up to see how the car works, and we need to see
2 how the car works to be able to understand exactly
3 what's going on with respect to this software and how it
4 is calling these databases, because what we're still
5 looking, your Honor, and still struggling to try to find
6 a way to electronically identify these inappropriate
7 downloads.

8 We believe that the data we're requesting in
9 this request will move the ball forward in that regard.
10 Our expert believes that. We as counsel believe that.

11 JUDGE LEGGE: Wait a minute. Wait a minute.

12 MR. COWAN: Again, they ask it for us on Titan,
13 which is a program that does similar things to what
14 Change Assistant does, and we produced it. And now
15 they're saying, fine, great, glad you got it, demanded
16 that we produce it or under the threat of a motion to
17 compel. We did that, and now they're not willing to
18 give us a reciprocal agreement. So when you look at why
19 do we need the source code, we need it for the same
20 reason they needed Titan source code.

21 MR. HOWARD: Except that's not what they've
22 asked for, your Honor. They've asked for software
23 sufficient to permit for the sole purpose of defending
24 access to inspect Customer Connection. That's not
25 source code. That's the program. Oracle doesn't use

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